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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1376

SAMUEL GOLDWYN PRODUCTIONS, a Limited Partnership, and SAMUEL GOLDWYN,
Petitioners,

vs.

JAMES A. MULVEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. THE DECISION OF THE COURT BELOW FOLLOWS CONTROLLING PRINCIPLES OF FEDERAL LAW AND SOUND ANTITRUST POLICY CONSISTENT WITH THE CLEAR INTENT OF CONGRESS; THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

In arguing for the issuance of a writ of certiorari, petitioners seek to cover all the available bases: they first urge the existence of a conflict between decisions of the Second and Ninth Circuit Courts of Appeals and addi-

tionally argue that the ruling of the Court below in our present case concerns an issue which ". . . has not been, but should be, settled by this Court." (Petition, p. 10.)

Petitioners fail to see that the rule for which they contend has been consistently rejected by this Court. If there does exist a conflict between the Second and Ninth Circuits as to the standing requirements of private antitrust plaintiffs under Section 4 of the Clayton Act (15 U.S.C. §15), this conflict arises because in certain of its decisions, the Second Circuit Court of Appeals has created formalistic and artificial standing requirements which unjustifiably foreclose the private antitrust remedy as to prospective plaintiffs who are injured by reason of antitrust violations. By adding these judicially created standing limitations to the statutory language, some courts have managed to emasculate the vitality of the treble-damage action as an important component of the public interest in vigilant enforcement of the antitrust laws. This Court has regularly rejected restrictions on the civil remedy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruces Juices v. American Can Co.*, 330 U.S. 743 (1947).

The instant decision by the Ninth Circuit clearly follows the consistently articulated mandate of this Court by recognizing that an individual such as respondent James A. Mulvey herein who suffers business or proprietary injury as a result of an antitrust violation should be encouraged to utilize the treble-damage action as a means of enforcing the national policy fostering free competition and thereby deter future antitrust violators from pursuing

anticipated wrongful conduct. (Petition, Appendix, p. 13a.)

In our present case the respondent Mulvey sold his interest in five motion pictures to the petitioners for $1,900,000.00. Under the terms of the contract the price to be paid to Mulvey would be reduced to the amount already paid (down payment plus a fixed percentage of the *net receipts from distribution* over a stated period of time). As the Court of Appeals below observed (433 F.2d at 1075; Petition, Appendix, p. 12a):

> "Mulvey contends that Goldwyn's block booking was a cause of his receiving only $740,800.95 on his contracts, instead of a price more nearly approximating the $1,900,000 contractual maximum".

In this light, the issue here presented may be seen more clearly. Had petitioner Goldwyn distributed Mulvey's films as individual products, rather than illegally block-booking them, the net receipts derived from the distribution of the five films here involved would have been far greater. Thus, petitioner's antitrust violation (the block-booking method of distribution) directly caused the diminution in value of Mulvey's property right or contractual interest in those films and the reduction in the net receipts from their commercial distribution.

A. The Decision of the Ninth Circuit Court of Appeals Below is in Accord with Prior Rulings and Statements By This Court.

This Court has, on numerous occasions, endorsed and promoted the Congressional policy encouraging the availability of the private treble-damage action. Petitioners contend that this Court has never decided the precise

standing issue here involved. But it is clear that this Court has frequently criticized artificial and formalistic rules which would restrict the application of the private antitrust remedy. The Court has never accepted or adopted the "target area", "area of the economy" or "indirect injury" limitations on the standing of antitrust plaintiffs. Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 Colum. L. Rev. 570 (1964). Rather this Court has specifically ruled that "to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and . . . that Plaintiff was damaged thereby are all the law requires." *Radiant Burners v. Peoples Gas & Light Co.,* 364 U.S. 656, 660 (1961). See also *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 670 (1962).

The issues under Section 4, then, are: (1) did Goldwyn's block-booking practice violate the antitrust laws? If so, (2) did Mulvey suffer injury to his business or property as a result of that illegal and anticompetitive method of distribution?

Any other limitations on an antitrust plaintiff's standing represent nothing more than "judicial glosses" engrafted upon Section 4 by courts which are suspicious of and antagonistic toward the antitrust laws. This Court has expressly renounced such a restrictive approach. As early as 1948 the Court stated in *Mandeville Island Farms, Inc. v. American Crystal Sugar,* 334 U.S. 219, 236 (1948):

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor, does it immunize the outlawed acts be-

> cause they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150; American Tobacco Co. v. United States, 328 U.S. 781. The Act is comprehensive in its terms and coverage, *protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.*" (Emphasis added.)

In *Radovich v. National Football League,* 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The Ninth Circuit, in its *Mulvey* decision below, has been one of the few courts which has attempted to follow this Court's mandate favoring liberal standing for antitrust plaintiffs. Therefore, the petition for writ of certiorari should not issue in the present case.

B. The Petition Should Not be Granted Because of Any Alleged Conflict with Decisions in Other Circuits.

Respondent does not deny that decisions by Courts of Appeal and District Courts in other circuits reflect a "harder line" concerning the standing requirements under Section 4 of the Clayton Act. *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir. 1970). *Petition for Cert. denied* (Oct. Term, 1970 No. 1062); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2nd Cir. 1970). *Petition for Cert. denied* (Oct. Term, 1970 No. 989); *SCM Corp. v. R.C.A.*, 407 F.2d 166 (2nd Cir. 1969) *Cert. denied.* 395 U.S. 943; *State of Hawaii v. Standard Oil Co. of California,* 431 F.2d 1282 (9th Cir. 1970) *Petition for Cert. granted* (Mar. 1, 1971) (Oct. Term, 1970 No. 1060); *V.T.R., Inc. v. Goodyear Tire & Rubber Co.*, 303 F.Supp. 773 (S.D.N.Y. 1969). Such decisions demonstrate an unwillingness on the part of some courts to enforce the clear policy and spirit of the federal antitrust laws as those laws have been consistently and uniformly construed by this Court. Instead of a device for effective enforcement of national policy, these courts regard the private action as a "windfall" the availability of which should be restricted rather than encouraged. *Snow Crest Beverages v. Recipe Foods,* 147 F.Supp. 907 (D. Mass. 1956).

These restrictive decisions, not the instant ruling of the Ninth Circuit, are the cases which should be reviewed and reversed.

Petitioners' primary argument for certiorari is based on the alleged conflict between the Ninth Circuit's *Mulvey* decision and the Second Circuit's *Fields* decision. In fact, although the two cases represent different philosophies

concerning the availability of the private treble-damage remedy, the two cases are not in direct conflict. Both *Mulvey* and *Fields* concerned plaintiffs seeking damages against motion picture distributors charged with illegal block-booking. In *Mulvey,* the plaintiff asserted that under the terms of his contract with the defendants, the block-booking method of distribution directly caused a diminution in the amount of receipts payable to plaintiff as compared to the amount plaintiff would have received had his films been distributed individually. In *Fields,* on the other hand, the plaintiff was really complaining ". . . that it was not allocated a fair share of the total receipts from the block." 318 F.Supp. at p. 88.

Thus, notwithstanding the superficial similarity of the two cases, the decisions are not directly conflicting. The petition for writ of certiorari should be denied.

II. THE NINTH CIRCUIT'S DECISION BELOW CORRECTLY RECOGNIZED THAT RESPONDENT MULVEY WAS IN THE "TARGET AREA" OF THE ANTITRUST VIOLATION, THAT MULVEY WAS DIRECTLY INJURED AND THAT THE INJURY WAS PROXIMATELY CAUSED BY THE VIOLATION.

Much of the petitioners' argument revolves around the question of whether the plaintiff-respondent Mulvey's property interest was within the area of the economy endangered by Goldwyn's antitrust violation and hence whether the injury to Mulvey was directly and proximately caused by that illegal block-booking. Although the Ninth Circuit, in its opinion below, critically discussed this "target area" concept, the Court did in fact apply the target area principles. As Judge Hufstedler stated

for the unanimous court below (Petition, Appendix, pp. 14a-15a):

> "It is unnecessary for us here to decide how much the restrictive decisions have been eroded by the Supreme Court, because Mulvey's claim meets even the restrictive tests.
>
> . . .
>
> But Mulvey was 'hit' as squarely as were *Karseal* and *Hoopes*: He was neither sideswiped nor struck by a carom shot. He was within the area 'which it could reasonably be foreseen would be affected' by block booking. *(Twentieth Century Fox Film Corp. v. Goldwyn, supra,* 328 F.2d at 220)."

Petitioners would have this Court rule that Mulvey's injury may not be redressed under the antitrust laws because Goldwyn was not "aiming at" Mulvey when he violated the Sherman Act. Petitioners argue that in the illegally block-booking of the involved films, only exhibitors and competing distributors were within the "target area" and therefore only they were "directly injured" by reason of Goldwyn's illegality. Such a view is patently incorrect. Judge Hufstedler adequately answered this contention in her opinion for a unanimous court below by stating:

> "Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.

> Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulveys films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue." (Petition, Appendix, p. 15a)

In this respect, it should be noted that one of the evils involved in the block-booking of motion pictures is that such results in the depreciation of the artistic value of an individual film. Block-booking also diminishes the value of the more desirable artistic products in the "package". To that extent anyone with an interest in a highly artistic, valuable or desirable product suffers as a result of the illegal distribution. As this Court has previously stated:

> "Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its [copyright] monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38, 46-47 (1962).

In our present case, respondent Mulvey suffered immediate and direct economic injury because the pictures in which he had an interest (particularly the classic "Pride of the Yankees") were highly artistic, popular and valuable. Yet they were block-booked with numerous other films in a package called the "Goldwyn Library"

and distributed on an all or none basis. Thus, the net receipts from distribution as to the more valuable films in which Mulvey was interested were diminished, directly reducing the amount which Mulvey ultimately received. Regardless of the labels attached to the relationship between Goldwyn and Mulvey [see *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)] the indisputable economic facts demonstrate that respondent Mulvey was directly and proximately injured by reason of petitioner's illegal block-booking of the motion pictures here involved.

In opposing respondent Mulvey's standing, petitioners erroneously attempt to analogize our case to those in which the injury to the plaintiffs was derivative. These latter rulings usually concern landlords or employees of a victim which has been destroyed by an antitrust violation and is thus incapable of paying rent or wages to the plaintiff landlord or employees. In these cases, the plaintiffs have no direct relationship with the antitrust violators, but suffer economic injury merely because of their relationship to the immediate victim of the antitrust violation. In each case the plaintiff suffered injury only in a derivative way and only because of his relationship with, and dependence for financial support upon, the primarily injured victim of the antitrust violation.

This analysis explains the recent case of *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir. 1969) relied upon by petitioners. There, RCA's antitrust claim alleged that SCM's monopolization injured SCM's competitors, some of whom were licensees or customers of RCA. Thus, perhaps RCA was not "directly" injured as a result of SCM's violation. RCA's injury was derivative; i.e., dependent upon its relationship with

its licensees who were the parties immediately injured by SCM's monopolization. See: *Advance Business Systems v. SCM Corp.*, 287 F.Supp. 143 (D. Md. 1968). See also: *Billy Baxter Inc. v. Coca-Cola Co., supra.* But compare other cases favoring the availability of the private antitrust remedy even in cases of so-called "derivative" injury. *Steiner v. Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956); *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957).

If there is an interest in restricting the availability of the antitrust remedy (although respondent rejects any such notion), it is to prevent actions by those who have had no direct contact or dealings with the violator. Surely, however, plaintiffs such as Mulvey whose injuries flow directly from his dealings with the defendant cannot be foreclosed. Mulvey was in privity of contract with Goldwyn and his injury was caused by Goldwyn's anti-competitive dealings concerning the five films which were the subject matter of that contract.

Mulvey then cannot be compared to the lessees or employees who have been denied standing. Mulvey's economic loss did not arise derivatively because of some relationship with exhibitors or competing distributors who petitioners now urge were the sole occupants of the "target area". Mulvey may maintain an antitrust action, then, because his economic loss arose directly out of his relationship with Goldwyn. *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y. 1964). As the Ninth Circuit Court of Appeals stated in *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967):

> "Appellants' claim was not 'derivative', for they sued for damages sustained by themselves and not

> by their tenants or others. Their injuries were 'direct' for they arose out of appellants' own relationship with Union . . . Appellants' 'injuries were not consequential' or 'secondary', for they did not result from injury to third persons. They were not 'remote' for they were the immediate result of the illegal conduct, without intervening cause."

Petitioners argue that only exhibitors and competing distributors are in the "target area" in a block-booking case. Such is not the case. For any party who *foreseeably* may suffer a direct injury to his business or property because of the block-booking is within the target area. (This would include producers of films and individuals such as Mulvey who have a property or contractual interest in the films.)

The "directness" of respondent Mulvey's injury in the present case is clear. The economic loss to Mulvey flowed directly from the illegal conduct by Goldwyn in restrictively distributing the five films in which Mulvey had an interest. Mulvey's injury was not one that is traceable or derivative from the losses suffered by exhibitors or competing distributors. Mulvey is not landlord or employee or licensee of these so-called "primary victims" of the block-booking.

In our present case, as in *Hoopes,* where a plaintiff suffers a direct economic injury because of a defendant's antitrust violation which arises out of the very dealings and transactions by and between the two parties, an action under Section 4 of the Clayton Act is proper. Such is especially true in a case such as ours where the subject matter of the antitrust conspiracy included the very films in which Mulvey had an interest, and the vio-

lation of the law caused direct economic injury to that specific property. *Waldron v. British Petroleum Co., supra.*

Modernly, a number of enlightened rulings by Courts of Appeal have attempted to reconcile "target area" considerations with the Congressional policy favoring liberal availability of the private antitrust remedy. This has been accomplished to a certain extent by focusing upon the issue of whether the injury to the plaintiff was *foreseeable.*

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express the view that the plaintiff must show that whether or not then known to the conspirators, plaintiffs' affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 220 (9 Cir. 1964); *Hoopes v. Union Oil Co., supra.*

In both of the above cases, the Ninth Circuit Court further ruled that the element of "proximate cause" is also satisfied if the economic injury to the plaintiff was foreseeable.

Petitioners have all but ignored the element of foreseeability. The conclusion is obvious: they cannot in good faith deny that a diminution in value of Mulvey's interest in the five films was a clearly foreseeable result of the restrictive block-booking of those films. Since Mulvey's interest in the five films was such as to be foreseeably injured by Goldwyn's block-booking of those very pictures, Mulvey was within a "target area" separate from

and independent of the target area in which the exhibitors were located and the still separate target area occupied by competing distributors. Individuals in each of these target areas were injured *directly* although in different ways. None of these parties derived its injury from the others. Each suffered a direct loss to his business or property and hence each such loss, including Mulvey's, is compensable under the federal antitrust laws. The ruling below, then, is not—as petitioners contend—a departure from the view in other circuits, but rather a far more enlightened and intelligent approach to the problem of defining the "target area". It should be noted that the decision of the Ninth Circuit below is consistent with the ruling of the Fourth Circuit in *South Carolina Council of Milk Producers v. Newton,* 360 F.2d 414 (4th Cir. 1966).

Finally, petitioners make the unusual, indeed astonishing, argument that respondent Mulvey's injury was the result of Goldwyn's breach of contract rather than Goldwyn's violation of the antitrust laws. In the court below, petitioners contended that Goldwyn's breach of contract was an "intervening cause" of Mulvey's injury, hence it, and not the antitrust violation, was the "proximate cause" of the resulting damage. This argument is unsupported by any legal authority whatsoever.

Petitioners thus ask this Court to create a new and unique rule of law as follows: In cases where a wrongdoer violates the antitrust laws and simultaneously breaches contractual duties owed to the victim, that victim's *only* remedy is a breach of contract action. Under such a view, state contractual remedies would supersede and preempt Congressionally created federal anti-

trust remedies. Such a contention is patently absurd. It would permit a supplier, who, because of a horizontal price-fixing conspiracy, raises his price above that stated in a contract, to escape antitrust liability in an action brought by the victim of that conspiracy. The victim would be limited to a suit for breach of contract.

The Court of Appeals below properly answered petitioners' arguments as follows (Petition, Appendix, pp. 12a-13a):

> "The arguments are specious . . . It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or non-availability of a common-law remedy for that wrong. The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct. That purpose would be frustrated by remitting to his common-law remedies one who has been injured by such conduct. (Cf. Karseal Corporation v. Richfield Oil Corporation (9th Cir. 1955) 221 F.2d 358)".

In our case, petitioners' illegal block-booking of films in which Mulvey had an interest *may have* constituted a breach of contract. However, that activity most certainly *was* a violation of the antitrust laws. As demonstrated above, the block-booking directly and foreseeably injured Mulvey's property. Mulvey then may elect which remedy he wishes to pursue in order to seek redress. When conduct by a wrongdoer is actionable under any one of several legal theories, it is the plaintiff, not the

defendant, who has the power of choosing the most effective and appropriate avenue of redress. Goldwyn's contention that his breach of contract preempts the availability of an antitrust remedy is a poorly disguised attempt to usurp Mulvey's right to elect which of several remedies to pursue. Parties to a contract may assert against each other antitrust claims which arise out of their contractual relationship. *Albrecht v. Herald Company,* 390 U.S. 145 (1968). Thus, the legislative policy in favor of the private treble-damage action will not permit the foreclosure of respondent Mulvey's antitrust claim against petitioners merely because a breach of contract action may also be possible. *Lawlor v. National Screen Service Corp.,* 349 U.S. 322 (1955); *Perma-Life Mufflers v. International Parts Corp., supra.*

CONCLUSION

For the reasons set forth herein, and for the reasons stated by the Court of Appeals below, respondent Mulvey's right to bring an antitrust action under Section 4 of the Clayton Act must be recognized. Therefore, the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
March 5, 1971

Respectfully submitted,

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